Art. XX GATT 1994 – Climate change and disadvantaged nations

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As signs of a looming climate catastrophe emerge, international law scholars and lawyers frequently seek additional paths to restrict greenhouse-gas emissions and to protect the environment. On a regular basis, their eyes turn towards the legal order of the World Trade Organization (WTO). Partly, this is due to the WTO's dispute settlement mechanism (DSM), since an equivalent compulsory system of adjudication is wanting in international environmental law.

In this regard, Art. XX of the General Agreement on Tariffs and Trade (GATT 1994) is one of the most commonly invoked provisions, as it covers the general exceptions from obligations under GATT 1994, with paragraphs (b) and (g) attracting the attention of environmentalists especially. More precisely, paragraph (b) provides WTO members with the opportunity to introduce policies to protect human, animal or plant life, whereas paragraph (g) lays down an exception for measures connected to the conservation of exhaustible natural resources.

Yet, even though bypassing toothless environmental law provisions by way of the exemption clause of GATT 1994 seems prudent from a 'global north' perspective, developing countries (DCs) and least developed countries (LDCs) may suffer from an undifferentiated application. Whereas these nations typically did not facilitate climate change, they nonetheless will be hit hardest by its effects. Thus, an indiscriminate application of Art. XX may not only violate the polluter principle, but more importantly the principle of common but differentiated responsibilities (CBDR-Principle) introduced by the United Nations Framework Convention on Climate Change (UNFCCC).

Subsequently, this piece details the possible application of Art. XX GATT 1994 in support of environmental protection as well as feasible differential treatment when it comes to developing or least developed countries.

Article XX GATT 1994 and climate change

Most famously, Art. XX:(b) and (g) GATT 1994 were invoked by the USA in *US – Shrimp* to justify violations of the GATT. Yet, this cases' panel found that the US measures infringed upon the introductory wording of Art. XX (the *chapeau*), and thus ruled in favour of the complainants, without an examination of US actions in light of Art. XX:(b) and (g) GATT 1994. This decision was upheld in principle by the Appellate Body (AB). However, the AB additionally found that the US measures in question could generally be justified pursuant to Art. XX:(g) GATT 1994 – if they were implemented in accordance with the *chapeau*.

When it comes to environmental concerns, paragraphs (b) and (g) of Art. XX are the most relevant provisions. Paragraph (b) requires policies in respect of measures for which the provision was invoked to be designed to protect human, animal or plant life. Furthermore, the measures must be necessary and applied in conformity with the introductory language to Art. XX GATT 1994. Paragraph (g) demands a holistic assessment as to the presence of all requirements set forth in that provision on a case by case basis. Thus, Art. XX GATT 1994 requires a two-tier analysis: the conditions of the respective paragraph(s) as well as the requirements of the *chapeau* have to be met.

Therefore, measures battling climate change, such as import restrictions based on the method of production or carbon taxes, can principally be justified under paragraphs (b) and (g) of Art. XX GATT 1994. However, such actions always have to be examined with the *chapeau* of Art. XX in mind, which demands that these measures 'are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.'

In light of the panels' and AB's jurisprudence, the main issue regarding the justification of national climate change policies, which infringe upon WTO rules, lies in the non#discriminatory manner in which they would have to be applied following the *chapeau* of Art. XX GATT 1994. Especially, when it comes to developing countries (DCs) or least developed countries (LDCs), a non-discriminatory application may still lead to disadvantages precisely due to this underdevelopment. It may be conceptualized therefore, that a sort of affirmative action or positive discrimination towards those states would be desirable, yet the wording of the *chapeau* seems to be clear. However, support for DCs and LDCs is possible, as will be shown in the following section of this text.

Exceptions for developing countries?

In international environmental law, the concept of common but differentiated responsibilities is widely acknowledged. According to this principle, states take on different obligations, depending on their socio-economic situation and their historical contribution to the respective problem, while pursuing a common goal.

Relating to the issue of climate change, DCs and LDCs are often heavily dependent on fossil fuels, be it in regard to trade or the energy supply of the nation, while their lack of funds and knowledge prohibits the development of a 'green' economy. Moreover, as responsibility for climate change through greenhouse gas emissions alongside an unsustainable use of resources lies primarily with industrialized countries, which also heavily profited from this exploitation of nature, it would seem manifestly inequitable to now divide the burden equally between all states.

Hence, for policies to be adapted in a genuine non-discriminatory manner, there has to be a distinction made between industrialized nations and underdeveloped states in connection with the concept of common but differentiated responsibilities, to account for their differences in socio-economic potential and historic liability (see the

preamble to UNFCCC). Yet, the question remains if such a principle exists in WTO law and how it would alter Art. XX GATT 1994.

While the WTO-Agreement itself – in its preamble – refers to sustainable economic development as an objective, the 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' (Enabling Clause) constitutes the main anchor point for differential treatment of members. The Enabling Clause is the legal basis for the WTO's 'General System of Preferences (GSP)', which allows developed countries' preferential treatment of goods originating in developing countries.

Therefore, it can be argued that if the general non-discriminatory provisions – the most#favoured nation treatment as well as the national treatment – are derogated by measures under the GSP, so can the non-discriminatory aspect of the *chapeau* of Art. XX GATT *a fortiori*. This finding is further supported by a more extensive kind of systemic interpretation pursuant to Art. 31 (3) lit. c of the Vienna Convention on the Law of Treaties (VCLT). Taking the statement of the Appellate Body in *US-Gasoline* into account that the GATT 'is not to be read in clinical isolation from public international law', Art. 3 UNFCCC, which establishes the principle of common but differentiated responsibilities, should be borne in mind.

However, Art. 31 (3) lit. c VCLT requires a rule to be 'applicable in the relations between the parties', a precondition, which the WTO *Biotech* panel infamously construed narrowly, as it declared the Cartagena Protocol 'not applicable' in this case, due to a lack of ratification by a number of WTO members. Yet, according to *Peters*, such an interpretation renders Art. 31 (3) lit. c VCLT 'largely meaningless', as it would make other treaties non-usable for the interpretation of multilateral treaties with a vast membership. Therefore, the superior view contends that only the disputing parties have to be members of a respective treaty for its application pursuant to Art. 31 (3) lit. c VCLT.

Such a reading could lead to a vast number of environmental treaties influencing the WTO and especially climate change policies under Art. XX GATT.

Conclusion

As the main part of the burden that comes with battling climate change should rest upon industrialized states, the concept of common but differentiated responsibilities is also applicable in WTO law. In this regard, a less narrow reading of Art. 31 (3) lit. c VCLT by the adjudicatory bodies of the WTO would be advisable. Thus, industrialized nations will be enabled to use their opportunities under the GSP in connection with Art. XX GATT 1994 to implement policies countering climate change, without further damaging the evolution of DCs and LDCs.

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